United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1401

To be argued by
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United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. LARRY JOHNSON,

Petitioner-Appellee,

against

LEON J. VINCENT, Superintendent of Green Haven Correctional Facility, Stormville, New York,

Respondent-Appellant.

BRIEF FOR RESPONDENT-APPELLANT

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BRIEF FOR RESPONDENT-APPELLANT

Questions Presented

1. Did the District Court correctly conclude that appellee's constitutional right to counsel was violated where the point of state law which his attorney neglected to present to the state appellate courts was not meritorious and, accordingly, there was no prejudice to appellee?

2. Did appellee demonstrate that he exhausted his state court remedies as required by 28 U.S.C. § 2254(b) where the record shows that he used the wrong state procedure to present his claim and that he has a presently available state remedy?

Statement

This is an appeal from an order of the United States District Court for the Southern District of New York (BAUMAN, J.), dated January 30, 1974, which granted

appellee's application for a writ of habeas corpus to the extent of vacating his judgment of conviction and remanding him for resentence *nunc pro tunc* so that he may prosecute another direct appeal. On February 26, 1974, the District Court granted appellant's motion for a stay of its order pending disposition of an appeal to this Court.

Facts

Appellee, Larry Johnson, is presently confined in Green Haven Correctional Facility, Stormville, New York, pursuant to a judgment of conviction rendered in Supreme Court, Bronx County (TIERNEY, J.). He was convicted of murder after a jury trial and sentenced on January 23, 1970 to a term of not less than 15 years to a maximum of life imprisonment.

The Trial

On the evening of December 14, 1968, appellee and four other men—Perry Ford, Boyce Thompson, Cecil B. Luckie and William Van Hook (a/k/a Koreem Evans)—went with Nicholas Chambers, the deceased, to the apartment of Linda West, Perry Ford's girlfriend. There Perry Ford began fighting with Chambers about an alleged burglary by Chambers of Linda West's apartment. Appellee and Boyce Thompson, his co-defendant at trial, joined Ford in kicking and beating Chambers until he fell unconscious on the floor (T. 129-30, 197, 319-20).* Appellee then took out a gun and told Luckie and VanHook to hit Chambers so that no one would be blameless and no one could squeal (T. 131, 199, 322, 399).

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* Numbers in parentheses preceded by the letter "T" refer to pages of the Trial Transcript. Numbers in parentheses preceded by the letter "H" refer to pages of the hearing held in the District Court. Numbers in parentheses followed by the letter "a" refer to pages of the appendix on this appeal.

After the beating, appellee told Luckie and VanHook to go downstairs. Thompson handed them a bag containing the items he had removed from Chambers' pockets and told them to get rid of it (T. 135-6, 324). As they left they saw appellee, Thompson and Ford supporting and dragging Chambers up the stairs leading from Linda West's apartment to the roof of the building (T. 136-9, 165-8, 325, 361-2). These observations were confirmed by Linda West (T. 234-6, 261-2). Although Thompson testified that appellee left him and Ford holding Chambers at the top of the stairs and returned downstairs (T. 459), Linda West stated that Ford and appellee returned to the apartment 15 to 20 minutes later (T. 237-8). At that time Ford told her that Chambers "was in the backyard dead" (T. 238) and that he had thrown Chambers off the roof (T. 299).*

On the basis of this testimony, the trial judge instructed the jury that they might find appellee guilty of murder if they found that he had shared the intent or purpose of the principal actor and if they concluded that he had acted with the intent of assisting in the commission of the crime (T. 611). The Court also instructed the jury with respect to the defense of renunciation pursuant to § 35.45 of the Penal Law, stating that they might find appellee innocent if they concluded that he went downstairs prior to Chambers' fall with the intention of withdrawing from participation in the crime, and that he made a substantial effort to prevent the commission of the crime charged (T. 628-32).

Appellee's trial counsel took exception to that part of the charge dealing with intent on the ground that the jury was not clearly instructed that they should distinguish between the intent to assault Chambers in the apartment for the

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* Ford was indicted with Thompson and appellee. However, on November 24, 1969, his case was severed from theirs and he entered a plea of guilty to manslaughter in the first degree in connection with another homicide, which plea also satisfied the indictment charging him with Chambers' murder.

purpose of locating the things he had stolen from Ford and the intent to act in concert for the purpose of murdering Chambers (T. 619-620). The trial judge declined to so charge the jury because in his view what happened in the apartment was "merged in and part of the evidence to spell out intent to commit the crime charged in the indictment" (T. 631).

The jury found both defendants guilty of murder.

State Court Proceedings

After a notice of appeal was filed in appellee's behalf, Lawrence P. Zamzok, Esq. was assigned by the Appellate Division, First Department to represent him on the appeal. Before perfecting the appeal, however, Mr. Zamzok moved in the trial court for an order vacating the judgment and/or granting a new trial on the ground of newly discovered evidence. The allegedly newly discovered evidence was a letter signed by Perry Ford stating that appellee was not on the roof at the time Chambers fell to his death. The motion was denied by Justice Tierney on November 9, 1971. The appeal from Justice Tierney's order was heard together with the appeal from the judgment itself and both were unanimously affirmed without opinion by the Appellate Division. *People* v. *Johnson,* 327 N.Y.S. 2d 545 (1st Dept. 1971); *People* v. *Johnson,* 327 N.Y.S. 2d 546 (1st Dept. 1971). Leave to appeal to the Court of Appeals was denied on January 25, 1972.

In August, 1972, appellee filed a second motion in the state courts to vacate the judgment of conviction. This time he claimed that, prior to his trial, Perry Ford had spoken to Assistant District Attorney Irvin J. Goldsmith, the prosecuting attorney, telling Goldsmith that appellee was not on the roof when the deceased fell to his death, and that Goldsmith suppressed this evidence. Appellee also alleged for the first time that the trial court had

erroneously refused to instruct the jury on the crime of assault, allegedly a lesser included offense of the homicide, and that he should not be penalized for his counsel's failure on appeal to brief and argue for reversal on this ground. On September 6, 1972, Justice Arnold L. Fein of the Supreme Court, Bronx County denied the motion.

Justice Fein held, *inter alia:*

> "If appellate counsel's alleged oversight is intended as a claim of inadequate representation, such conduct occurred at the appellate level and not during the course of the proceedings in the nisi prius court. It does not appear that the trial court erred". (25a).

Accordingly, such an allegation was not a ground for relief under § 440.10 of the Criminal Procedure Law. On October 31, 1972, leave to appeal from Justice Fein's order was denied pursuant to § 460.15 of the Criminal Procedure Law by Justice Aron Steuer of the Appellate Division, First Department.

Proceedings in the District Court

In his application for federal habeas corpus relief, appellee asserted the same claims raised in the motion before Justice Fein. He alleged that (1) the prosecuting attorney improperly suppressed an exculpatory conversation he had had with Perry Ford (7a) and (2) the trial judge erroneously refused to instruct the jury on assault —an error which appellee claimed should be considered by the federal courts even though his appellate counsel did not raise it on appeal* (6a). On September 10, 1973, the District Court assigned counsel to represent appellee

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* Contrary to the opinion below, appellee has never claimed that there was a failure to charge "the *lesser offenses* included within the crime of murder" (48a, emphasis supplied; See also 51a, 54a). The petition makes reference solely to the failure to charge assault as a "lesser included offense" (6a).

and an evidentiary hearing was held on September 28 and October 12, 1973.*

The Hearing

Of the four witnesses who were called at the hearing below, only Lawrence P. Zamzok, Esq. testified with respect to the counsel issue.** Mr. Zamzok was assigned by the Appellate Division to represent appellee in his state court appeal (H. 4-5). He testified that he graduated from Columbia Law School in 1964 and that he has, since that time, been a trial attorney practicing primarily in the area of commercial and personal injury litigation (H. 3-4). He stated that, as a trial attorney, he has made requests for instructions to the jury and has handled an appeal (H. 15-16). He had, as of the time of his assignment to represent appellee, also represented defendants in approximately three criminal appeals, although these had involved appeals from guilty pleas (H. 5). Mr. Zamzok also studied criminal law while at Columbia (H. 16).

In describing his efforts on appellee's behalf, Mr. Zamzok testified that, when he became aware of the letter written by Perry Ford stating that appellee was not on the roof, he arranged a meeting with Justice Tierney, the trial judge, and an Assistant District Attorney to discuss

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* In assigning counsel, the District Court suggested that appellee's allegation regarding the instruction on assault might be viewed as a claim of ineffective assistance of counsel on appeal. The affidavit in opposition, sworn to by Constance B. Margolin on March 26, 1973, responds to the narrower issue, raised in the petition, of whether appellee is entitled to federal habeas corpus relief merely because the trial judge may have erred in refusing to instruct the jury on assault. See pp. 2-6 of the affidavit in opposition.

** The remaining testimony—which is not discussed in this brief—related to the allegation of suppression. That issue is not raised on this appeal since it was ultimately rejected by the District Court (49-50a) and appellee has neither filed a notice of appeal from that part of the decision nor obtained the requisite certificate of probable cause.

this new development (H. 6-7). After this meeting, in or about November, 1970, he filed a motion for a new trial on the grounds of newly discovered evidence, recognizing that since the letter was not part of the trial record it could not be considered by the Appellate Division an appeal from the underlying conviction (H. 7). In the months following the filing of this motion, Mr. Zamzok made more than 25 telephone calls to Justice Tierney's chambers to find out why the motion had not yet been decided and wrote many letters of inquiry (H. 7, 10). During that period he also prepared an affidavit for Ford's signature to supplement the letter, read the lengthy trial transcript several times, read considerable correspondence from Larry Johnson and did legal research (H. 10). He also obtained the District Attorney's consent to a delay in the perfecting of the appeal from the conviction until such time as Justice Tierney could decide the motion for a new trial and an appeal therefrom could be consolidated with the appeal from the conviction (H. 8). Although the factual and legal issues involved in both appeals were very similar, Mr. Zamzok wrote two briefs on appellee's behalf (H. 8).

In explaining his failure to raise on appeal the issue of the trial judge's refusal to instruct the jury on assault, Mr. Zamzok stated that when he read the transcript he did not realize that appellee's trial attorney, Mary J. Lowe, had actually made a request for a charge on assault as a lesser included offense (H. 15). He admitted a lack of familiarity with the doctrine of lesser included offenses at the time that he wrote the brief on appeal, but stated that he did hear counsel for Boyce Thompson, Larry Johnson's co-defendant, raise it at oral argument before the Appellate Division (H. 14).

The Opinion of the District Court

As a predicate to holding that appellee had been denied the effective assistance of counsel on appeal from his

conviction, the District Court "ascertain[ed] the applicable law" (50a) and concluded that the trial "court was in error" as a matter of *New York* law in refusing to charge the assault in the apartment as a lesser offense included in the homicide which took place on the roof (52a). In the Court's view "a fair reading of the colloquy between court and counsel . . . suggests" that appellee's trial attorney made the necessary request for such a charge (52a). At that point, under *People* v. *Mussenden*, 308 N.Y. 558 (1955), the leading New York case on the subject, the trial judge had the duty of charging the lesser degrees or included crimes unless the evidence necessary to find the defendant guilty of the lesser or included crimes "necessarily prove[d] guilt of the greater crime as well". 308 N.Y. at 563.

The District Court determined that the

> "jury could have believed the testimony of VanHook and Luckie that [appellee] participated in an assault [in the apartment] and simultaneously accepted [the co-defendant's] account of Chambers' death, which exonerated [appellee]". (52a).

Therefore, the Court reasoned that this was a case where conviction of the lesser crime did not necessarily prove guilt of the greater.

Having found that the trial judge had "disregarded the settled rule" established by the New York cases (52a), the District Court proceeded to evaluate the performance of appellate counsel. It found that Mr. Zamzok had not raised the issue of the erroneous charge because he was unfamiliar with the rule involved (54a). The Court also emphasized counsel's limited experience in handling criminal matters (53a) and held that, although an erroneous instruction to the jury is not ordinarily a basis for federal habeas corpus relief (53a), the failure of coun-

sel to raise such an error in the state courts resulted in a constitutional violation.

Accordingly, the Court directed that appellee's judgment of conviction be vacated and that he be resentenced *nunc pro tunc* so that he may prosecute another direct appeal (59a).

POINT I

The District Court erroneously decided that appellee's constitutional right to counsel was violated since contrary to the finding below, the issue of state law which counsel neglected to present to the state appellate courts was not meritorious and, therefore, appellee was not prejudiced.

The District Court's conclusion that appellee was inadequately represented on his state court appeal is based upon its determination that (1) the defense made a request to charge that the assault which took place in the apartment was a lesser offense included in the homicide which took place on the roof and (2) that, as a matter of New York law, the refusal of the trial judge to so charge was reversible error. Neither of these determinations is correct and, accordingly, the granting of habeas corpus relief was unwarranted.

It is clear from the trial record that the defense never made any request to charge the crime of assault as a crime included in the homicide. On the contrary, the colloquy between defense counsel and the trial court which was relied upon below is notably devoid of any reference to lesser degrees or included offenses (See T. 619-623). Instead, counsel repeatedly indicated that she viewed the assault which took place in the apartment as a separate crime for which appellee had not been indicted. Indeed, she specifically stated:

> "But, Judge the point that Mr. Goldsmith made was exactly the point I was trying to bring out that the

> jury should be told that if they find as to either of these defendants that—committed an assault that assault was not charged in this indictment'' (T. 621).

All of counsel's statements—including her summation to the jury—emphasize a desire to draw a distinction for the jury between the assault in the apartment and the homicide which took place later on the roof. For example, counsel asked the Court to charge the jury

> ''that the intent necessary to act in concert to find out where . . . Perry Ford's clothing was and the result of the assault on Chambers inside that apartment should be clearly distinguished from an acting in concert from the purpose of murdering . . . Chambers'' (T. 62).

See also T. 622-623. Earlier, in summation, counsel stated:

> ''Now if you find from the evidence that my client . . . assaulted Nick Chambers in that apartment, you are entitled to draw that conclusion; but an assault for one purpose is not an intent to murder . . .'' (T. 536).

These statements demonstrate that the defense's contention was that the assault in the apartment and the intent to commit that assault could not be considered by the jury as evidence of intent to commit the homicide. Therefore, at most, there was an ambiguous request to charge the assault in the apartment as a *separate* crime and the doctrine of lesser included offenses was never called into play.*

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* The defense conceded to the jury that appellee had participated in the assault in the apartment (T. 538). This explains counsel's equivocation at page 623 of the transcript where she indicated that she would be willing to forego an assault charge

(footnote continued on following page)

In any event, it would have been error as a matter of state law for the trial court to charge assault as a lesser included offense of the homicide specified in the indictment. The indictment charged that on or about December 14, 1968, appellee, acting in concert with Perry Ford and Boyce Thompson "with intent to cause the death of one Nicholas Chambers caused the death of said Nicholas Chambers by throwing said Nicholas Chambers from a building". Under § 300.50 of the Criminal Procedure Law, the trial court was required to charge a lesser included offense if "a reasonable view of the evidence would support a finding that the defendant committed such lesser offense but did not commit the greater". This provision codifies the rule of *People* v. *Mussenden*, 308 N.Y. 558 (1954) which required submission of a lesser offense "only where there is some basis in the evidence for finding the accused innocent of the higher crime, and yet guilty of the lower one". 308 N.Y. at 563.

In deciding that this case fell within the applicable language, the District Court reasoned that although several prosecution witnesses observed appellee helping Ford and Thompson carry Chambers up the stairs to the roof, there was testimony by Thompson that appellee turned around and went downstairs before anything occurred on the roof. If the jury believed Thompson they could find appellee innocent of homicide. At the same time, according to the District Court, the jury could accept the strong evidence of appellee's participation in the beating which took place in the apartment and thereby convict him of the crime of assault. Therefore, the record in this case satisfied the *Mussenden* rule.

(footnote continued from preceding page)

if the jury were instructed as she requested on the question of intent. Significantly, the District Court never found that a specific request had been made, but simply concluded that a "fair reading of the colloquy . . . suggests" that there was a request (52a).

The flaw in the District Court's analysis is that the assault in the apartment was not a lesser included offense of the homicide. That term is defined in § 1.20 of the Criminal Procedure Law as follows:

> "When it is impossible to commit a particular crime without concomitantly committing, by the same conduct, another offense of lesser grade or degree, the latter is with respect to the former, a 'lesser included offense' ".

See also, *Dedieu* v. *People,* 22 N.Y. 178 (1860); *People* v. *Miller,* 143 App. Div. 251 (1st Dept.), *aff'd.* 202 N.Y. 618 (1911).

Under this definition, the only assault as to which the jury conceivably might have been charged on the facts of this case was that which was directly connected with the events on the roof. However, aside from the fact that there was no request with respect to that assault, such a charge would have been unwarranted since, as the District Court itself recognized, under *Mussenden,* two requirements must be met. There must be evidence that the defendant is innocent of the greater crime "and yet guilty of the lower one". In the instant case, if the jury believed the co-defendant's testimony that appellee went downstairs before the homicide took place, then appellee was guilty of *no* crime on the roof.*

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* Moreover, a charge with respect to any assault connected with the events on the roof was precluded by Section 444 of the former New York Code of Criminal Procedure which specifically provided:

> "Upon a trial for murder or manslaughter, if the act complained of is not proven to be the cause of death, the defendant may be convicted of assault in any degree constituted by said act, and warranted by the evidence".

See *People* v. *Wheeler,* 79 App. Div. 396 (4th Dept. 1903); *People* v. *DeGarmo,* 73 App. Div. 46 (4th Dept. 1902). In the instant case there was never any claim that the act charged in the indictment was not the cause of death.

In no event could the assault in the apartment have been submitted to the jury as a separate crime since it was a crime for which appellee had not been indicted—a fact which the trial judge recognized and specifically pointed out (T. 621). Where, as here, the indictment specifically alleges acts constituting a crime committed at a particular time and place, the defendant cannot be convicted of a crime which occurred at another time and in another place. Criminal Procedure Law § 200.50; *People* v. *Zambounis*, 251 N.Y. 94 (1929); *People* v. *Santoro*, 229 N.Y. 277 (1920); *People* v. *Dumar*, 106 N.Y. 502 (1887); *People* v. *Weisser*, 36 A D 2d 54 (4th Dept. 1971), *aff'd.* 31 N Y 2d 1051 (1973).

The likelihood that appellee's conviction would have been reversed if his attorney had raised the legal points relied upon by the court below is thus so remote that it cannot properly be a basis for finding counsel's performance shockingly inadequate. *United States* v. *Wight*, 176 F. 2d 376, 379 (2d Cir. 1949), *cert. denied* 338 U.S. 950 (1950); *United States ex rel. Maselli* v. *Reincke*, 383 F. 2d 129 (2d Cir. 1967); *Hooks* v. *Roberts*, 480 F. 2d 1196 (5th Cir. 1973). The *Maselli* decision, upon which the District Court primarily relied, is easily distinguished in this respect.

In *Maselli*, this Court held that counsel's failure to protect Maselli's right to appeal his conviction resulted in a violation of his constitutional rights because a co-defendant's conviction had been reversed by the state courts on the identical ground available to Maselli. Compare *Fay* v. *Noia*, 372 U.S. 391 (1963). Unlike the instant case, there was no need for this Court to analyze technical issues of state law or to speculate about the prospects for success in the state courts. The prejudice to Maselli was both grave and obvious. 383 F. 2d at 133, n. 4; 383 F. 2d at 134, n. 5. Neither of these elements exists in the instant case.

The District Court itself acknowledged that errors of counsel and other evidence of ineptitude do not rise to a

constitutional level unless they have a "readily identifiable impact on the outcome of the proceedings" (58a). The impact relied upon by the District Court is speculative at best and, therefore, the decision below should be reversed.

POINT II

Appellee failed to satisfy the exhaustion requirement of 28 U.S.C. § 2254(b) with respect to his Sixth Amendment claim.

The District Court did not specifically address itself to the question of whether or not appellee had exhausted his state court remedies with respect to his Sixth Amendment claim. However, implicit in the fact that the Court proceeded to determine the merits of this claim is a finding that the requirements of 28 U.S.C. § 2254(b) had been met. The record does not support this conclusion.

It is fundamental that, as an applicant for federal habeas relief, appellee has the burden of demonstrating that he has exhausted the available state remedies. In order to satisfy this burden in the context of this case he must show either (1) that he "fairly presented to the state courts" his claim that his appellate counsel's performance was constitutionally inadequate (See *Picard* v. *Connor,* 404 U.S. 270, 275 [1971]) or (2) that there was no available remedy to review this claim. 28 U.S.C. § 2254(b).

The only state proceeding in which the adequacy of appellate counsel's representation is mentioned is appellee's motion pursuant to § 440.10 of the Criminal Procedure Law to vacate the judgment of conviction. Significantly, the issue was not raised by appellee but, instead, was suggested by Justice Fein, before whom the motion was made.*

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* Appellee had simply alleged—as he did in his petition to the court below—that he should not be precluded from post-conviction review because of counsel's failure to claim on appeal that assault should have been charged to the jury.

However, having framed the issue, Justice Fein then refrained from considering it on the merits. Moreover, he specifically held that if there had been error in this regard, it was error which did not take place in the trial court and thus fell outside the limits of § 440.10 (25a). In short, Justice Fein held that the remedy which appellee had utilized was the wrong remedy for seeking review of this issue. Appellee thereafter unsuccessfully sought leave to appeal to the Appellate Division from Justice Fein's order but never initiated any other state proceeding.

It is evident that no state court has ruled on the merits of appellee's counsel claim. It is equally clear that the counsel issue was not "fairly presented to the state courts" since resort to the wrong state remedy does not satisfy the exhaustion requirement unless the merits were nevertheless decided. *United States ex rel. Cuomo* v. *Fay,* 257 F. 2d 438, 441, 442 (2d Cir. 1958). At the same time, Justice Fein's opinion in no way suggests that appellee does not have a state remedy by which to challenge the adequacy of counsel's representation. In fact, the appropriate remedy is by way of a motion in the Appellate Division to reargue the direct appeal on the ground that appellee was inadequately represented by his appellate counsel. That court can then review the performance of the attorney it assigned to appellee in light of its interpretation of the relevant state law. *People* v. *Siena,* 19 A D 2d 524 (1st Dept. 1963). Alternatively, it is always open to appellee to make an application to reargue his motion for leave to appeal to the Court of Appeals.

The fact that a question of state law must be resolved in order to determine the merits of appellee's constitutional claim makes this a particularly strong case for requiring him to return to the state courts. If the underlying issue of whether assault should have been charged to the jury was never considered by the state courts because counsel failed to raise it, then the effect of the decision below was

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to ignore the principle that federal courts do not sit to decide questions of state criminal law. *United States ex rel. Mintzer* v. *Dros* (2d Cir. 1968); *Paulson* v. *Turner*, 359 F. 2d 588 (10th Cir.), *cert. denied* 385 U.S. 905 (1966); *United States ex rel. Hall* v. *Casscles*, 321 F. Supp. 673 (S.D.N.Y. 1971); *United States ex rel. Young* v. *Follette*, 308 F. Supp. 670 (S.D.N.Y. 1970).

If, on the other hand, the Appellate Division did review appellee's state law claim—as it had power to do even though the point was not argued on appeal (*People* v. *Stubbs*, 30 A D 2d 932 [4th Dept. 1968]; Criminal Procedure Law § 470.15)—then, in essence, the District Court decided the constitutional question by substituting its interpretation of state law for that of the state courts. Such a ruling also goes beyond the proper limits of federal habeas corpus review. The principle of comity may not be circumvented simply because resolution of the state law question bears on the constitutional issue under consideration.

CONCLUSION

The decision of the District Court should be reversed.

Dated: New York, New York, March 29, 1974.

Respectfully submitted,

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